

## Chapter 7

# Insolvency Specialists and Government Enquiries: A Unique Opportunity to Contribute to the Public Good

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### Introduction\*

This lecture addresses the contribution of research by insolvency specialists to the development of insolvency law and practice, in particular to the (re-)design of insolvency systems. It draws on examples from Australia of government enquiries to reform insolvency law as well as other areas of law with which it intersects. It comments on the role that insolvency specialists can play in such policy debates – not only insolvency academics<sup>1</sup> but also scholarly practitioners – for the public good.

Where governments seek to improve the laws affecting personal and corporate economic failure, insolvency academics can bring original insights they gain through their teaching. The process of regularly lecturing on insolvency law provides a valuable and deep understanding of its internal and external connections. This is a good foundation from which to analyse an area. Teaching also requires academics to maintain currency through identifying issues arising in practice. Such insights provide a perspective which places insolvency academics in a unique position, as “disinterested” observers, to contribute to the public good by way of commentary and submissions to improve the law.

This lecture will draw upon material that is publicly available on the internet for the benefit of an audience on the other side of the globe but who may be interested in comparative research on insolvency with an Australian dimension.<sup>2</sup>

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\* This piece will be reprinted under the same title in Chapter 00 in R. Parry (ed), *Designing Insolvency Systems* (2015, INSOL Europe, Nottingham) (000-000) (forthcoming).

<sup>1</sup> My focus has been on insolvency law academics, although in my review of government enquiries, it is encouraging to see that academics from a range of law sub-disciplines, as well as other disciplines, such as economics and social work, have contributed their expertise.

<sup>2</sup> For that reason, the names of insolvency researchers (and where their names first appear, their university affiliations) are included in the text or footnotes. This is based on information on the web sites for the various enquiries – although it is possible that some submissions have been inadvertently missed.

In so doing, I am confident that there will be issues in common with the range of jurisdictions represented in this INSOL Europe audience, as well as points of difference that may be interesting and informative for future research.

My lecture will first provide some background on the Australian context for insolvency law and policy. Secondly, it will describe three broad categories of government enquiries to which insolvency specialists have contributed over the past few decades. They are:

- (i) referrals to independent law reform commissions by the Attorney-General;
- (ii) a range of departmental consultations by working parties or through discussion or options papers; and
- (iii) enquiries undertaken by committees of parliamentarians.

Next I mention briefly some independent statutory bodies that have enquired into laws affecting insolvency. Finally, I draw together some themes about the contributions that insolvency specialists can make to government to improve insolvency systems and I encourage you to contribute your own unique expertise should similar opportunities arise.

### **The Australian Context**

To begin, I provide some constitutional context for Australian law-making regarding insolvency. In 1901, the six Australian colonies federated to become the Commonwealth of Australia, comprising six States.<sup>3</sup> Under the Australian Constitution, the new Federal Parliament was granted a specific power, to be exercised concurrently with the States, to make laws with respect to “bankruptcy and insolvency”.<sup>4</sup> The colonies’ personal bankruptcy and insolvency laws continued in existence until comprehensive federal bankruptcy legislation came into effect in 1928. The main statute that currently applies to the insolvency of natural persons is the Bankruptcy Act 1966 (Cth).

Although the grant of power to the Commonwealth to legislate on “insolvency” was wide enough to extend to the liquidation of companies,<sup>5</sup> the then English approach of including the regulation of corporate insolvency in the general corporations legislation was followed in Australia. Thus, the colonies - and later, the States - continued to legislate on the winding-up of trading companies and other associations in various Companies Acts.<sup>6</sup>

The Australian Constitution granted the Commonwealth concurrent law-making power with the States over corporations, in respect of:

<sup>3</sup> Queensland, New South Wales, Victoria, Tasmania, South Australia and Western Australia. There are also two internal Territories: the Australian Capital Territory, the seat of the national capital Canberra, and the Northern Territory.

<sup>4</sup> Section 51(xvii), Australian Constitution. Australian statutes are available at: <www.austlii.edu.au>.

<sup>5</sup> Justice R. French, “Federal Jurisdiction — An Insolvency Practitioner’s Guide to the Labyrinth” (2000) 8 *Insolvency Law Journal* 128, at 129.

<sup>6</sup> M. Gronow, *McPherson’s The Law of Company Liquidation* (2008, Lawbook Co, Sydney), at [1.400].

“...foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.”<sup>7</sup>

Despite the constitutional limitations imposed by the words “trading”, “financial” and “formed”, a move towards uniform corporate regulation in Australia began in the early 1960s and continued for a number of decades. However ongoing constitutional difficulties required the referral of state powers to the Commonwealth<sup>8</sup> combined with the Commonwealth’s pre-existing constitutional powers to finally achieve a sound basis for comprehensive federal legislation in the form of the Corporations Act 2001 (Cth) and the Australian Securities and Investments Commission Act 2001 (Cth).<sup>9</sup> Thus the parliament with responsibility for legislating on both personal and corporate insolvency is the Commonwealth or federal Parliament based in Canberra.

However, the bifurcation of insolvency law between individual (or natural person) debtors and corporate debtors has resulted in separate regulatory bodies for personal and corporate insolvency administrations and practitioners. Individual debtor administrations are regulated by the Australian Financial Security Authority (“AFSA”) established as an executive agency within the Attorney-General’s portfolio.<sup>10</sup> Corporate insolvency administrations are regulated by the Australian Securities and Investments Commission (“ASIC”).<sup>11</sup> ASIC and AFSA have signed a Memorandum of Understanding to provide a framework for cooperation in the performance of their regulatory functions<sup>12</sup> and both bodies are members of the International Association of Insolvency Regulators (“IAIR”).<sup>13</sup>

More significantly for present purposes, different government departments are responsible for policy and law reform for personal and corporate debtors.<sup>14</sup> The Commonwealth Attorney-General has responsibility for bankruptcy policy, the Bankruptcy Act 1966 (Cth) and AFSA. Within the Attorney-General’s Department, The Civil Law Division (within the Civil Justice and Legal Services Group) advises the Attorney-General on policy relating to, bankruptcy and

<sup>7</sup> Section 51(xx), Australian Constitution.

<sup>8</sup> *Ibid.*, section 51(xxxvii).

<sup>9</sup> The states agreed to refer the relevant powers for a period of five years that may be terminated earlier or may be extended by proclamation. The referral of powers has since been extended, most recently until 2016.

<sup>10</sup> Until August 2013, it was known as the Insolvency and Trustee Service Australia (“ITSA”). For more information, refer to the Annual Report available at: <[www.afsa.gov.au](http://www.afsa.gov.au)>.

<sup>11</sup> See: <[www.asic.gov.au/](http://www.asic.gov.au/)>.

<sup>12</sup> In September 2014, ASIC and AFSA signed a new Memorandum of Understanding (replacing a 2002 agreement) to facilitate liaison, cooperation, assistance and the exchange of information between the agencies in performing their regulatory functions, for which see: <[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/AFSA-MOU-published-1-October-2014.pdf/\\$file/AFSA-MOU-published-1-October-2014.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/AFSA-MOU-published-1-October-2014.pdf/$file/AFSA-MOU-published-1-October-2014.pdf)>.

<sup>13</sup> See: <<http://www.insolvencyreg.org/>>.

<sup>14</sup> Until 1996, they were in different sections (ITSA and Companies and Business Law Section) within the Attorney General’s Department. However, the Companies and Business Law Section was moved to Treasury following the 1996 election and a change of government.

insolvency. As AFSA's Portfolio Department, it also communicates with industry through the Bankruptcy Reform Consultative Forum.

Corporate insolvency law reform is the responsibility of The Treasury, which provides advice to government on company law and corporate governance issues, corporate insolvency, corporate financial reporting and oversight of portfolio agencies connected to corporate regulation and related financial issues. Corporate insolvency falls within the Financial Services and System Division which sits within the department's Markets Group.

Using three categories, and beginning with law reform commission referrals, I now provide an overview of Australian government enquiries and the contribution of insolvency specialists to these to improve the design of the insolvency system over recent decades.

### Law Reform Commission Enquiries

There have been few formal Australian law reform commission referrals that comprehensively enquire into insolvency. The most recent reports have their origins in 1976 when the Commonwealth Attorney-General issued terms of reference to the Australian Law Reform Commission ("ALRC") to report upon whether the Bankruptcy Act 1966 (Cth) adequately provided for small or consumer debtors to discharge or compromise their debts from their present or future assets or earnings and what legislative measures could be adopted to provide financial counselling facilities to small or consumer debtors.<sup>15</sup>

The reference resulted in ALRC Report 6 "*Insolvency: The Regular Payment of Debts*" (1977).<sup>16</sup> The Commissioner in Charge, David Kelly,<sup>17</sup> was assisted by consultants who included industry experts as well as three Australian academics.<sup>18</sup> It is noteworthy that the ALRC also consulted internationally – appointing an expert on bankruptcy law, Harvard Law Professor Vern Countryman.<sup>19</sup> The Commission received written submissions from four Australian academics<sup>20</sup> as well as a Canadian Professor.<sup>21</sup>

<sup>15</sup> In making its report, the ALRC was to have regard to "the community's interest in the financial rehabilitation of small but honest debtors, and the need to ensure that creditors have an effective means of enforcing the payment of debts due to them." (*Insolvency: The Regular Payment of Debts* [1977] ALRC 6, at v).

<sup>16</sup> See: <<http://www.alrc.gov.au/report-6>>.

<sup>17</sup> David Kelly was a foundation full time member of the Australian Law Reform Commission 1976-1980 and a Professor of Law at University of Adelaide 1980-1983.

<sup>18</sup> Professor Colin Howard (University of Melbourne); Anthony Moore (University of Adelaide); John Willis (La Trobe University).

<sup>19</sup> On Professor Countryman's support for the rights of the debtor, see: <<http://www.law.harvard.edu/news/bulletin/backissues/fall99/article6.html>>.

<sup>20</sup> Professor Bob Baxt (Monash University); Bruce Kercher (Macquarie University); C.W. O'Hare (Monash University); J. Neville Turner (Monash University).

<sup>21</sup> Professor William Neilson (University of Victoria, British Columbia).

The final Report concluded that the existing systems were inadequate, as they did not meet the needs of a modern consumer credit based society and recommended a review of the entire law of bankruptcy.<sup>22</sup> A substantial review of the Bankruptcy Act 1966 (Cth) was undertaken by the Department of Business and Consumer Affairs and the Act amended in 1980.<sup>23</sup> An example of a recommendation which was taken up, albeit in an amended form was to introduce automatic discharge from bankruptcy.<sup>24</sup> Some other recommendations were not implemented for many years.<sup>25</sup>

During its work on ALRC Report 6, the ALRC identified that judgment debt recovery procedures in the States and Territories could contribute to worsening insolvency. As a second stage of its response to the 1976 terms of reference, the ALRC investigated these procedures more fully in ALRC Report 36 *"Debt Recovery and Insolvency"* (1987).<sup>26</sup> Professor David Kelly continued as the Commissioner in Charge (1976–1985).<sup>27</sup> Consultants were appointed once again and comprised industry experts and academics, from Australian and overseas law schools<sup>28</sup> as well as from a department of social work.<sup>29</sup> Submissions were received from two academics<sup>30</sup> and an academic consultant, who also consulted on ALRC Report 6, made oral submissions during the public hearings.<sup>31</sup>

The ALRC acknowledged additional assistance was received from a large number of persons and organisations, including local<sup>32</sup> and international<sup>33</sup> academics. One of these was Professor Alan Fels, an Australian economist and lawyer,<sup>34</sup> who had criticised the ALRC Report 6:

“...for its failure to analyse the costs and benefits of the reforms it proposed.”

<sup>22</sup> ALRC Report 6 concluded that the procedures provided under the Bankruptcy Act 1966 (Cth) for rearranging of debts were costly, cumbersome and inappropriate for the needs of non-business debtors. See: <<http://www.alrc.gov.au/inquiries/insolvency-and-debt-recovery>>.

<sup>23</sup> ALRC Report 36, Chapter 1 Introduction, at [2].

<sup>24</sup> ALRC Report 6 recommended an automatic six-month discharge for non-business debtors unless creditors object. The 1980 amendments provided that a bankrupt should be automatically discharged from bankruptcy after three years although it also introduced procedures for objecting to the discharge.

<sup>25</sup> For example, a system for the regular payment of debts for non-business debtors: “Part IX Debt Agreements”, was introduced in 1997.

<sup>26</sup> See: <<http://www.alrc.gov.au/report-36>>.

<sup>27</sup> Ron Harmer was also appointed a Law Reform Commissioner during this period.

<sup>28</sup> From Australia, A.J. Duggan (University of Melbourne, now of University of Toronto); Bruce Kercher; A.P. Moore (University of Melbourne) and J.E. Willis (La Trobe University). From overseas, Dr. C.G. Veljanovski (Centre for Socio-Legal Studies, Oxford University).

<sup>29</sup> Dr. T.C. Puckett (La Trobe University).

<sup>30</sup> A.J. Duggan and Bruce Kercher.

<sup>31</sup> J. Willis in Melbourne. Ron Harmer also made oral submissions at the public hearings in Perth.

<sup>32</sup> These included Professor Maureen Brunt and Alan Fels, competition lawyers (Monash University); Martin Ryan (Department of Social Work, La Trobe University).

<sup>33</sup> Professor C.R.B. Dunlop (a Canadian specialist in creditor and debtor law) and Professor R.M. Goode OBE LL.D. (an English specialist in corporate and insolvency law).

<sup>34</sup> Professor Fels became chairman of the Australian Competition and Consumer Commission (1995–2003).

It was said that:

“...the discussion of insolvency took place in an economic vacuum; overlooking considerations of demand and supply; with no attempt to assess whether the proposed reforms might have significant and adverse effects on the supply of credit.”<sup>35</sup>

The 1977 Report’s recommendation of a general insolvency inquiry was taken up in 1983 when the Attorney-General referred the law and practice relating to the insolvency of both individuals and bodies corporate to the ALRC. The consequent ALRC Report 45 “*General Insolvency Inquiry*” (1988)<sup>36</sup> is commonly known as the “*Harmer Report*” after the Commissioner-in-Charge Ron Harmer, then a legal practitioner and subsequently a Professor at University College London.<sup>37</sup> The part time Commissioners on this reference included another scholarly practitioner, Richard Fisher.<sup>38</sup> Consultants included three Professors of Law<sup>39</sup> as well as a Professor of Banking and Finance.<sup>40</sup> The list of written submissions discloses significant Australian and international academic input.<sup>41</sup> The public hearings did not appear to include academics.

ALRC Report 45 examined the developments of overseas jurisdictions in relation to insolvency, in particular in relation to voluntary arrangements with creditors. There were nine submissions from the United States including from Professors Thomas Jackson and Kenneth Klee. The ALRC also received submissions from Europe on cross-border insolvency - from Professor Ulrich Drobnig, Max Planck Institut, Hamburg and Professor Dr. Hans Hanisch, Switzerland.

The Corporate Law Reform Act 1992 (Cth) implemented many of the 1988 Report’s recommendations on corporate insolvency, including the introduction of the new Part 5.3A on voluntary administration, which was a significant development in Australian corporate rescue regulation. In 1993, legislative changes also implemented the Harmer Report’s recommendation to abolish the statutory priority of the Tax Commissioner over other creditors in

<sup>35</sup> ALRC Report 36, above note 23, at [115].

<sup>36</sup> See: <<http://www.alrc.gov.au/report-45>>.

<sup>37</sup> Ron Harmer was an internationally recognised insolvency expert who worked with many multilateral organisations, including INSOL International, the Asian Development Bank, the World Bank, the European Bank for Reconstruction and Development and UNCITRAL on improving the design of insolvency systems.

<sup>38</sup> Richard Fisher AM was then a partner at Dawson Waldron and is now General Counsel and an Adjunct Professor, University of Sydney.

<sup>39</sup> Professor Robert Baxt, who at the time was Chairman, Trade Practices Commission; Professor Harold Ford (University of Melbourne), Chairman of the Companies and Securities Law Review Committee, which was established by the Ministerial Council for Companies and Securities pursuant to the inter-governmental agreement between the Commonwealth and the States to assist the Ministerial Council by carrying out research into, and advising on, law reform relating to companies and the regulation of the securities industry; and Professor James O’Donovan (University of Western Australia).

<sup>40</sup> Professor Tom Valentine (Macquarie University).

<sup>41</sup> These included submissions by Professor Ford; A.P. Moore; Dr. O’Donovan.

bankruptcy and insolvency in relation to unremitted tax.<sup>42</sup> This was well-received by insolvency specialists, although other legislative provisions have ensured taxation laws continue to have a significant impact on insolvency.<sup>43</sup>

So far I have referred to formal Law Reform Commission enquiries concerning insolvency that were referred to it by the government of the day. Now I will provide a snapshot of some less formal ways in which the government gathers input on policy and law reform.

### Governmental Working Parties, Options Papers and Discussion Papers

A recurrent theme of Australian enquiries has been government interest in the regulation of insolvency practitioners.<sup>44</sup> In 1993, the government established the “*Working Party on the Review of the Regulation of Corporate Insolvency Practitioners*”.<sup>45</sup> This was a result of recommendations for changes to the regulation of insolvency practitioners made by the *Harmer Report* (1988) and the Trade Practices Commission in its “*Study of the Professions*” (1992).<sup>46</sup> The only submission by an academic (this presenter) was in respect of the importance of local regulation of corporate insolvency practitioners for cross-border insolvency practice. The Working Party Report was delivered in June 1997 and some ten years later it was referred to when the Corporations Amendment (Insolvency) Bill proposals were introduced in 2007.

In recent years, the federal government has issued Discussion Papers and Options Papers, seeking input on specific law reform proposals. In June 2011, the Attorney-General and the Parliamentary Secretary to the Treasurer released an Options Paper titled “*A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia*” (2011).<sup>47</sup> It examined reforms to address concerns about misconduct in the insolvency profession and to improve the value for money for recipients of insolvency

<sup>42</sup> The Insolvency (Tax Priorities) Legislation Amendment Act 1993 (Cth) amended the Income Tax Assessment Act 1936 (Cth), the Bankruptcy Act 1966 (Cth) and the Corporations Law.

<sup>43</sup> For example, see C. Brown *et al.*, “The Certainty of Tax in Insolvency: Where does the ATO fit?” (2011) 19(2) *Insolvency Law Journal* 108.

<sup>44</sup> That is, the specialist accounting professionals who are appointed as company liquidators, bankruptcy trustees etc.

<sup>45</sup> It comprised departmental officers; a senior corporate regulator; accounting and legal practitioners specialising in insolvency as well as the President of the insolvency practitioners’ professional body.

<sup>46</sup> Its mandate was to consider and make recommendations as to whether any changes should be made to the current system for the registration, appointment and remuneration of insolvency practitioners, as well as to the procedures for responding to complaints about the conduct of corporate insolvency administrations.

<sup>47</sup> Both Ministers were involved as it covered practitioners appointed in both personal and corporate insolvency. See:

<[http://www.treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/Consultations/2011/A%20Modernisation%20and%20Harmonisation%20of%20the%20Regulatory%20Framework/Key%20Documents/PDF/Options\\_Paper20110602.ashx](http://www.treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/Consultations/2011/A%20Modernisation%20and%20Harmonisation%20of%20the%20Regulatory%20Framework/Key%20Documents/PDF/Options_Paper20110602.ashx)>.

services.<sup>48</sup> Of the 33 submissions received,<sup>49</sup> one was from insolvency academics Associate Professors Chris Symes<sup>50</sup> and David Brown.<sup>51</sup>

Then, in December 2011, the government issued a Proposals Paper<sup>52</sup> to which there were some 29 submissions,<sup>53</sup> including from Associate Professors Colin Anderson<sup>54</sup> and David Morrison<sup>55</sup> as well as Associate Professors Christopher Symes and David Brown. Subsequently, draft laws on the regulation of insolvency professionals were released for public comment by March 2013.<sup>56</sup> Of the 16 submissions, none were by academics. At the time of writing, there is no further information on the progress of the Bill.<sup>57</sup>

A current wide-ranging enquiry, the “*Financial System Inquiry*” (“FSI”), has amongst other things requested input on insolvency laws in Australia.<sup>58</sup> In 2013, the government initiated this inquiry following the 2012 release of a government Consultation Paper on strengthening the banking regulator’s crisis management powers.<sup>59</sup> During the height of the global financial crisis which began in 2008, a few Australian banks did experience funding pressure to a limited extent, however there were no failures.<sup>60</sup> Subsequently there has been some commentary about the possible need to review Australia’s crisis management tools because of the concentrated structure of its banking sector.<sup>61</sup>

In July 2014, the FSI released an Interim Report in which it sought submissions on a wide range of issues, including whether there is evidence that

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<sup>48</sup> Key reform areas in the paper include promoting a high level of professionalism and competence by practitioners, enhancing transparency and communication and promoting increased efficiency in insolvency administration. See: <<https://www.afsa.gov.au/practitioner/pir-newsletter/june-2011-pir-newsletter>>.

<sup>49</sup> See: <<http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2011/A-Modernisation-and-Harmonisation-of-the-Regulatory-Framework/Submissions>>.

<sup>50</sup> University of Adelaide.

<sup>51</sup> University of Adelaide.

<sup>52</sup> See:

<[http://www.treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/Consultations/2011/Reforms%20to%20Modernise%20and%20Harmonise%20Insolvency/Key%20Documents/PDF/Proposals\\_Paper\\_insolvency.ashx](http://www.treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/Consultations/2011/Reforms%20to%20Modernise%20and%20Harmonise%20Insolvency/Key%20Documents/PDF/Proposals_Paper_insolvency.ashx)>. It acknowledged the work of the Senate Economics Reference Committee, *Inquiry into Liquidators and Administrators* (2010), discussed below.

<sup>53</sup> See: <<http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2011/Reforms-to-Modernise-and-Harmonise-Insolvency/Submissions>>.

<sup>54</sup> Queensland University of Technology.

<sup>55</sup> University of Queensland.

<sup>56</sup> See: <<http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2012/Insolvency-Law-Reform-Bill>>.

<sup>57</sup> **CHECK AT PROOFING STAGE.**

<sup>58</sup> See: <<http://fsi.gov.au/>>. This FSI material draws on joint research by the presenter with Michael Murray, Legal Director ARITA and Visiting Fellow, QUT Faculty of Law, on the Australian approach to crisis management in the banking sector.

<sup>59</sup> The Treasury, *Strengthening APRA’s Crisis Management Powers* (Consultation Paper, 2012), a copy of which is available at:

<<http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2012/APRA>>.

<sup>60</sup> See: <<http://www.rba.gov.au/publications/bulletin/2011/dec/pdf/bu-1211-5.pdf>>.

<sup>61</sup> International Monetary Fund, *Australia: Financial System Stability Assessment* (IMF Country Report No 12/308, 2012), at [51], a copy of which is available at: <<http://www.apra.gov.au>>.



Australia's external administration regime causes otherwise viable businesses to fail and, if so, what could be done to address this. The FSI has received over 6,500 submissions in response to its Interim Report, some of which are by insolvency specialists and address the external administration issue.<sup>62</sup> The final report is due in December 2014.

### Federal Statutory Authorities

Government has been assisted with respect to corporate insolvency laws through the Corporations and Markets Advisory Committee ("CAMAC"),<sup>63</sup> a statutory body established in 1989 to provide independent advice to the responsible Minister on the administration of corporate and financial services laws or changes to them. However the federal government announced in its 2014-15 Budget that it would be abolishing CAMAC as a "smaller government" measure.<sup>64</sup> While this announcement prompted academics and professional bodies<sup>65</sup> to query the decision and to support an ongoing role for CAMAC, the government has released an exposure draft Bill and associated explanatory material to give effect to the decision and called for submissions.<sup>66</sup>

While CAMAC has undertaken work on its own initiative,<sup>67</sup> most issues it has examined were referred by government Ministers. For example, in May 2007, the Parliamentary Secretary to the Treasurer referred a number of issues on insolvency law to CAMAC arising from its consultation on proposed changes to the law through the Insolvency Bill (2007) referred to below. CAMAC issued a consultation paper to which it received submissions, including from academics.<sup>68</sup>

CAMAC's role was only to make recommendations and there was no requirement for the Minister or government to act on its reports. Just one example of its impact has been the reference to its reports on "*Corporate Voluntary*

<sup>62</sup> Submissions were made by academics on a broad range of the issues, for example by Professor Justin O'Brien; Dr. George Gilligan; Professor Ross Buckley; Ken Ooi; Professor Kingsford-Smith (University of New South Wales); Associate Professor Paul Latimer (Monash University) and Phillip Maume (Technische Universität München, Germany). The submission by Dr. Colin Anderson, Cath Brown and the author (Commercial & Property Law Research Centre, Queensland University of Technology) addressed insolvency issues.

<sup>63</sup> See: <<http://www.camac.gov.au/CAMAC/camac.nsf>>. Its most recent report was on report on crowd sourced equity funding in May 2014.

<sup>64</sup> See: <[http://www.budget.gov.au/2014-15/content/bp2/html/bp2\\_expense-07.htm](http://www.budget.gov.au/2014-15/content/bp2/html/bp2_expense-07.htm)>. The committee's advisory function is to be merged into Treasury.

<sup>65</sup> The Law Council of Australia's letter in June 2014 to the relevant Minister expressing concern at the proposal can be found at: <[http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2857\\_-\\_Commonwealth\\_budget\\_proposal\\_to\\_abolish\\_corporations\\_and\\_markets\\_law\\_reform\\_body.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2857_-_Commonwealth_budget_proposal_to_abolish_corporations_and_markets_law_reform_body.pdf)>.

<sup>66</sup> See: <<http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2014/CAMAC>>.

<sup>67</sup> Such as the "*Members' Schemes of Arrangement Report*" (2009).

<sup>68</sup> The submission by Professor Michael Adams (University of Western Sydney) and Dr. Marina Nehme was cited at 18 and that by Anil Hargovan (University of New South Wales) at 74. All are available under the rubric "Submissions" at: <[www.camac.gov.au](http://www.camac.gov.au)>.

*Administration*” (1998) and the “*Rehabilitation of Large and Complex Enterprises*” (2004) in the Explanatory Memorandum to the Corporations Amendment (Insolvency) Bill 2007.<sup>69</sup>

Another federal statutory body is the Productivity Commission,<sup>70</sup> the government’s independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. In 2010, it undertook a “*Regulatory Burdens on Business Review*” (2010) and Associate Professors David Morrison and Colin Anderson made a submission regarding the duplication of laws around insolvency and the regulation of that profession.<sup>71</sup>

A further Productivity Commission enquiry that intersected with insolvency law was the “*Inquiry into The Market for Retail Tenancy Leases in Australia*” (2007). Associate Professor Jenny Buchan,<sup>72</sup> an expert in franchising law, made a submission on the implications for franchisees occupying retail premises not being protected under some State legislation and as a result potentially being detrimentally affected if the franchisor becomes insolvent.<sup>73</sup>

### Parliamentary Enquiries

Thus far, I have been addressing enquiries by the executive arm of government, Ministers and their Departments. I will now turn to the legislative arm of government, the Parliament. The Commonwealth Parliament itself also undertakes enquiries through its Parliamentary Committees and on occasions has done so in respect of insolvency law reform.

The Australian Parliament comprises a lower house (the House of Representatives) and an upper house (the Senate). Bills have to be passed by both houses and assented to by the Governor-General before they become Acts of Parliament.<sup>74</sup> More enquiries in the area of insolvency have been initiated either by the Senate, which is understandable as it is a house of review and seen as a “watchdog” of the executive branch of government, or by joint parliamentary committees comprising members of both houses of Parliament than by the House of Representatives.<sup>75</sup>

<sup>69</sup> Additional CAMAC publications include the “*Report on External Administrations*” (2008); “*Shareholder Claims against Insolvent Companies: Implications of Sons of Gwalia Decision*” (2008).

<sup>70</sup> It is established under the Productivity Commission Act 1998 (Cth): <<http://www.pc.gov.au/>>.

<sup>71</sup> See: <[http://www.pc.gov.au/\\_data/assets/pdf\\_file/0013/100606/subdr053.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0013/100606/subdr053.pdf)>.

<sup>72</sup> University of New South Wales.

<sup>73</sup> “For example, if the franchisor becomes insolvent, the head lease may be disclaimed by the franchisor’s liquidator... This leaves the franchisee who is a sub lessee, licensee, or casual tenant without a contract based right to remain in the premises unless a side agreement has been reached between the franchisee and the landlord.” Jenny Buchan’s Submission at 5, a copy of which is available at: <[http://www.pc.gov.au/\\_data/assets/pdf\\_file/0014/70223/sub139.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0014/70223/sub139.pdf)>.

<sup>74</sup> Bills can be introduced in either House, except for laws relating to revenue and taxation, which must be introduced in the House of Representatives: <[www.aph.gov.au](http://www.aph.gov.au)>.

<sup>75</sup> The House of Representatives has a Standing Committee on Economics, which can inquire into and report on any annual reports referred to it by the House. In March 2014, it agreed to undertake an inquiry into the 2013 Annual Report of the Australian Prudential Regulation Authority, an independent

*Senate Committees*

The Senate has developed a comprehensive range of committees<sup>76</sup> to investigate matters of public policy; examine government administration; and scrutinise proposed legislation. The Senate Committee that is most relevant for policy and regulation in the area of insolvency is the Senate Economics Committee, however other committees can be involved depending upon the department responsible for proposed legislation. I will now discuss three types of enquiries by Senate committees.

First, a Senate Committee may be asked to examine proposed legislation. A recent example relevant to insolvency is an inquiry by the Senate Education and Employment Legislation Committee into employee issues in insolvency. On 4 September 2014, the Fair Entitlements Guarantee Amendment Bill 2014 was introduced into Parliament.<sup>77</sup> This Bill proposes to amend the Fair Entitlements Guarantee Act 2012 (Cth) to cap the maximum amount of redundancy pay entitlement available under the Fair Entitlements Guarantee ("FEG") scheme at 16 weeks; and make technical amendments to clarify the operation of the scheme.<sup>78</sup> When the Bill came before the Senate later that day, it referred the Bill to the Senate Education and Employment Legislation Committee for inquiry and report. It called for submissions with a closing date of 12 September 2014 and reporting date of 24 September 2014.<sup>79</sup> Eleven submissions were received from industry bodies, trade unions and the Department of Employment, the responsible government department, as well as from a law firm that acts for employees seeking payment of entitlements where their employer is under administration in insolvency. A public hearing was held in Melbourne on 17 September.<sup>80</sup> No submissions or appearances at the public hearing were made by academics, although the law firm's submission referred to research on the FEG scheme published by practitioners and industry<sup>81</sup> and academics.<sup>82</sup> Even though this was a

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statutory authority which regulates banks, superannuation and insurance companies. This inquiry is relevant to insolvency because it concerns the regulatory settings for resolution of financial distress for banks. See:

<[http://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Economics/2013\\_APR\\_Annual\\_Report](http://www.aph.gov.au/Parliamentary_Business/Committees/House/Economics/2013_APR_Annual_Report)>.

<sup>76</sup> Senate Committees are either Select Committees, appointed by the Senate to inquire into some specific matter and to report back to the Senate within a set time, or Standing Committees, a permanent committee of the Senate for the life of the whole of any one Parliament.

<sup>77</sup> See: <<http://www.comlaw.gov.au/Details/C2014B00186>>.

<sup>78</sup> Hansard is available at: <[www.aph.gov.au](http://www.aph.gov.au)>.

<sup>79</sup> See:

<[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Education\\_and\\_Employment/Fair\\_Entitlements](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/Fair_Entitlements)>.

<sup>80</sup> Nine witnesses appeared representing the Australian Industry Group and Australian Chamber of Commerce and Industry (2) (employers); the Australian Council of Trade Unions and Textile Clothing & Footwear Union of Australia (4) (employees); and the Department of Employment (3) (government).

<sup>81</sup> S. Whelan, L. Zwier and R. Campo.

relatively brief amendment bill, this was a remarkably short time for submissions. The Report handed down on 24 September 2014 fell along party lines - with a majority of members, drawn from the government, supporting the legislation, and two dissenting reports delivered by the federal opposition party and one of the minor parties.<sup>83</sup>

Secondly, a Senate committee may undertake an enquiry in response to a current issue of public concern. An example from the Senate Economics Committee concerns a former liquidator, Mr Stuart Ariff, who was arrested on 19 criminal charges following an investigation by ASIC. The offences related to his conduct whilst he was the liquidator a company and in 2011, he was convicted and jailed for six years. Following the publicity surrounding this matter in 2010, the Senate Economics Committee undertook an “*Inquiry into Liquidators and Administrators*”.<sup>84</sup> Among the 95 submissions, many of which were marked confidential (likely debtors and creditors affected by insolvency), there were submissions by academics from four universities.<sup>85</sup> The Report referred extensively to academics’ written submissions as well as oral submissions at the public hearings in Adelaide, Newcastle and Canberra.<sup>86</sup>

The Senate Committee referred to the lack of adequate, publicly available data on the state of the corporate insolvency industry in Australia. (This has been a recurring theme in submissions to several inquiries.<sup>87</sup>) When the Senate Committee’s report discussed the need for better data on insolvencies, a whole subsection was devoted to the “Academics’ perspectives”. The Senate Committee noted it had received evidence from several legal academics based in Brisbane and Adelaide who were critical of the lack of public data on insolvency<sup>88</sup> and who made international comparisons.<sup>89</sup>

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<sup>82</sup> Submission 11 by Slater & Gordon dated 15 September 2014 referred to research by Mark Wellard (Queensland University of Technology); David Morrison (University of Queensland); and Helen Anderson (University of Melbourne):

<[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Education\\_and\\_Employment/Fair\\_Entitlements/Submissions](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/Fair_Entitlements/Submissions)>.

<sup>83</sup> At the time of writing, the Bill was still before the Senate.

<sup>84</sup> See:

<[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/Completed\\_inquiries/2008-10/liquidators\\_09/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Completed_inquiries/2008-10/liquidators_09/index)>.

<sup>85</sup> Written submissions by Jeffrey Fitzpatrick and Vivienne Brand (Flinders University); Christopher Symes (University of Adelaide); Colin Anderson (Queensland University of Technology); and David Morrison (University of Queensland).

<sup>86</sup> Public hearings at Adelaide (Dr. Vivienne Brand, Associate Professors David Brown and Chris Symes); Newcastle (Professor Scott Holmes); and Canberra (Associate Professors Colin Anderson and David Morrison).

<sup>87</sup> See the discussion below on the Parliamentary Joint Committee on Corporations and Financial Services “*Corporate Insolvency Laws: a Stocktake Report*” (2004).

<sup>88</sup> “*Inquiry into Liquidators and Administrators*” (2010), at [9.17] referring to Associate Professors Colin Anderson, David Morrison and David Brown.

<sup>89</sup> Associate Professor David Brown referred to the more developed data gathering mechanisms of the United Kingdom and New Zealand governments and Associate Professor Colin Anderson to a large United States study on liquidators’ fees and returns to creditors.

The Report referred under “Academic Research” to academics’ frustration at the lack of adequate insolvency statistics. Dr. David Morrison was quoted as follows:

“...if you want data from ASIC, if you are an academic and you would like to look at something independently, unless it is a priority area that is presumably flagged between the government and ASIC, ASIC cannot provide it to you. If you want to pay to get data at ASIC, even if you can afford to pay for it—and most of us cannot, of course, because we are employees of the government and therefore paid small amounts of money—the records they have are based on paper and microfiche, so you have to pay a search fee every time you want something and you have to go into quite an archaic set of files. So, even if ASIC wanted to help people with independent information, they actually do not have the technology to do it, and that is a very stark contrast to ITSA, the bankruptcy regulator.”<sup>90</sup>

The Report also explored options proposed by academics on gathering statistics on insolvency matters.<sup>91</sup> The Senate Committee concluded that it strongly agreed with the view that there needed to be a better system for collating and analysing corporate insolvency data in Australia. It specifically agreed with Associate Professors Colin Anderson and David Morrison that the lack of data is an issue that needs to be addressed in a comprehensive way to ensure confidence in information about the perceived problems and the resulting policy.<sup>92</sup>

Thirdly, Senate committees also have a specific mandate to monitor the performance of departments and agencies. In 2013-2014, the Senate Economics Committee undertook an inquiry into the “*Performance of the Australian Securities and Investments Commission (ASIC)*”.<sup>93</sup> The committee examined many aspects of ASIC’s work, concentrating on two case studies in particular: consumer credit and misconduct by financial advisers. During its enquiry, the Committee called for submissions<sup>94</sup> (including writing to academics and others with an interest in ASIC’s performance and inviting submissions) and also conducted public hearings.<sup>95</sup> The Committee’s list of references included articles by academics.<sup>96</sup>

<sup>90</sup> “*Inquiry into Liquidators and Administrators*” (2010), at [9.24]. Mr Warren Day of ASIC responded to these comments and explained to the Committee the limitations placed upon ASIC, for example, that payments are required by law.

<sup>91</sup> *Ibid.*, at [9.26].

<sup>92</sup> *Ibid.*, at [9.31].

<sup>93</sup> See: <[http://www.apf.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/ASIC](http://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC)>.

<sup>94</sup> Many academics made written submissions including Jason Harris (University of Technology Sydney); Professors Dimity Kingsford Smith, Justin O’Brien, Dr. George Gilligan, Associate Professor Michael Legg, Dr. Marina Nehme (University of New South Wales); Dr. Suzanne Le Mire, Associate Professors David Brown, Christopher Symes and Ms Karen Gross (University of Adelaide); Dr. Vivienne Brand and Dr. Sulette Lombard, (Flinders University); Professor Robert Baxt AO; Professor AJ Brown (Griffith University).

<sup>95</sup> Oral submissions were made by Associate Professor David Brown and Dr. Suzanne Le Mire (University of Adelaide); Professors Dimity Kingsford-Smith; Justin O’Brien (Sydney hearings); Professor Bob Baxt; Jason Harris; Dr. Vivienne Brand and, Dr. Sulette Lombard; Professor AJ Brown (Canberra hearings). President David Lombe, CEO Mr John Winter and Legal Director Mr Michael Murray, represented the insolvency professional body ARITA.

<sup>96</sup> “*Performance of the Australian Securities and Investments Commission*” (2014), Appendix 6. These included articles by Helen Anderson; Vicky Comino (University of Queensland); Aakash Desai and Ian

Once again, a Senate Report referred to the lack of access to information collected by ASIC. A number of witnesses were critical of ASIC's failure to publish much of the information which it collects as a result of its regulatory activities.<sup>97</sup> The Report referred to a submission from several Adelaide academics which expressed concern about:

"...the relative lack of statistics and data for researchers, stakeholders and the wider public."<sup>98</sup>

Mr Jason Harris, University of Technology Sydney, submitted that the lack of data, particularly relating to enforcement and insolvencies, stifles debate as:

"...we are unable to determine exactly what it is that ASIC does aside from what it tells us; but, more importantly, we are unable to work out what it is ASIC is failing to do."<sup>99</sup>

The insolvency practitioners' professional body, the Australian Restructuring, Insolvency and Turnaround Association ("ARITA")<sup>100</sup> also drew attention to the amount of prescribed information that ASIC receives and stores under legislation and how little is published. While acknowledging ASIC had improved its collection and publication of data it indicated that it needed to do more. When appearing before the Committee, Michael Murray, ARITA's Legal Director, compared ASIC's statistics with those of AFSA who:

"...produce good statistics which inform the law reform process in bankruptcy. We do not have that sort of information in corporate insolvency."<sup>101</sup>

ARITA's President, David Lombe, gave an example of the limitations imposed on researchers, when he referred to work undertaken by an academic, Mark Wellard:<sup>102</sup>

"ARITA gives a research prize so that someone can do research. One of our prize-winners was looking at deeds of company arrangement. When you go into voluntary administration, there is a decision about whether you go into liquidation or a deed of company arrangement. He was trying to work out how many companies go into deeds of company arrangement and how successful those deeds of company arrangements are. He wanted to get access to

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Ramsay (University of Melbourne); Jason Harris and Michael Legg; Dimity Kingsford-Smith; and Roman Tomasic (University of South Australia).

<sup>97</sup> *Performance of the Australian Securities and Investments Commission* (2014), at [22.13].

<sup>98</sup> *Ibid.*, at [22.14].

<sup>99</sup> *Ibid.*, at [22.15].

<sup>100</sup> See: <[www.arita.org.au](http://www.arita.org.au)>.

<sup>101</sup> *Performance of the Australian Securities and Investments Commission* (2014), at [22.19].

<sup>102</sup> Visiting Fellow, Queensland University of Technology. See M. Wellard, "A Review of Deeds of Company Arrangement" (2014) 26(2) *Australian Insolvency Law* 12.

information from ASIC to be able to do that very important research. It would have cost thousands of dollars and ASIC just said, “We can’t give that information to you.”<sup>103</sup>

The Senate Committee formally recommended that:

“ASIC promote ‘informed participation’ in the market by making information more accessible and presented in an informative way.”<sup>104</sup>

### *Parliamentary Joint Committees*

Finally, Parliamentary Joint Committees (with members from the House of Representatives and Senate) are also established by resolution or legislation agreed to by both houses.<sup>105</sup> In the area of insolvency, the most significant Joint Committee is the Parliamentary Joint Committee (PJC) on Corporations and Financial Services.

Its most recent and extensive enquiry in relation to insolvency was initiated in 2002, when it agreed to consider and report on the operation of Australia’s insolvency and voluntary administration laws – resulting in the Report, “*Corporate Insolvency Laws: a Stocktake*” (2004) (“*Stocktake Report*”). It invited submissions addressing the terms of reference and notified various academics, organisations and professionals of its inquiry.<sup>106</sup> It then released an Insolvency Issues Paper providing background material and information on aspects of insolvency law that had been highlighted in submissions or in media and professional commentary on corporate insolvency law and practice. The Issues Paper also posed questions for consideration by both the Committee and witnesses in preparing for the series of public hearings. During 2003, the Joint Committee conducted public hearings in Toowoomba, Canberra, Melbourne and Sydney, including by teleconference to international academics, Professors Andrew Keay and Ron Harmer. Its report referred to submissions and research published by academics.<sup>107</sup>

Following publication of the “*Stocktake Report*”, the government announced in 2005 that it intended to reform Australia’s insolvency laws. Because of the specialised nature of insolvency, it appointed an Insolvency Law Advisory Group to provide technical advice on the draft legislation. It comprised senior

<sup>103</sup> “*Performance of the Australian Securities and Investments Commission*” (2014), at [22.20], referring to research undertaken by Mark Wellard, Visiting Fellow, QUT, and his research for the Terry Taylor Scholarship ARITA: <<http://www.arita.com.au/about-us/arita-terry-taylor-scholarship/past-recipients>>.

<sup>104</sup> Ibid., at xxx (Recommendation 39).

<sup>105</sup> See: <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint)>.

<sup>106</sup> See:

<[http://www.aph.gov.au/~media/wopapub/senate/committee/corporations\\_ctte/completed\\_inquiries/2002\\_04/ail/report/ail\\_pdf.ashx](http://www.aph.gov.au/~media/wopapub/senate/committee/corporations_ctte/completed_inquiries/2002_04/ail/report/ail_pdf.ashx)>.

<sup>107</sup> See:

<[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Corporations\\_and\\_Financial\\_Services/Completed\\_inquiries/2002-04/ail/submissions/sublist](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2002-04/ail/submissions/sublist)>. A list of the submissions is set out in Appendix 1. Submissions were made by the following academics: Mr Colin Anderson (then University of Southern Queensland) and Dr. David Morrison; as well as the author.

accounting and legal practitioners, an academic (the presenter) and representatives of the leading accounting, banking, insolvency practitioner and legal professional bodies.<sup>108</sup> During 2006, tranches of draft legislation were discussed by the Advisory Group. In November 2006, the Parliamentary Secretary to the Treasurer released a draft Corporations Amendment (Insolvency) Bill 2007 and Corporations and ASIC Amendment Regulations 2007 for public comment.<sup>109</sup>

During the progress of the Bill through Parliament, the Parliamentary Joint Committee on Corporations and Financial Services commenced a new inquiry - an *"Inquiry into the Exposure Draft of the Corporations Amendment (Insolvency) Bill 2007"*.<sup>110</sup> It narrowed this inquiry's focus to those elements of the 2004 *"Stocktake Report"* which the Government had rejected, agreed with in principle or argued were matters falling under the jurisdiction of ASIC. It therefore sought the views of stakeholders on specific issues of continuing relevance.<sup>111</sup> The 2007 Report referred to written<sup>112</sup> and oral submissions<sup>113</sup> by insolvency academics and once again the PJC commented on empirical research and review processes.

## Conclusion

In conclusion, what are some of the themes indicated by this broad review of the contributions by insolvency specialists to some significant Australian government enquiries over recent decades? I would like to suggest some six or seven themes have emerged which apply to Australia and which are likely to resonate with many other jurisdictions as well.

First, it is apparent that the executive arm of government uses a wide range of approaches to gathering input from specialists on law reform and that there are many opportunities to contribute. While formal referrals to Law Reform

<sup>108</sup> Parliamentary Secretary to the Treasurer, *Establishment of Insolvency Law Advisory Group* (Media Release 6 of 2006): <<http://parlsec.treasurer.gov.au/cjp/content/pressreleases/2006/006.asp>>. It included representatives from the Institute of Chartered Accountants in Australia, CPA Australia, the National Institute of Accountants, the Australian Banking Association and the Insolvency Practitioners Association of Australia.

<sup>109</sup> The Explanatory Memorandum to the Corporations Amendment (Insolvency) Bill 2007 referred to suggestions for reform in the *"Harmer Report"* (1988) and the Trade Practices Commission's *"Study of the Professions"* (1992); the Government Working Party Report on the *"Review of Insolvency Practitioners"* (1997); the Parliamentary Joint Committee on Corporations and Financial Services Report on *"Corporate Insolvency Laws: a Stocktake"* (2004); and the CAMAC reports on *"Corporate Voluntary Administration"* (1998) and the *"Rehabilitation of Large and Complex Enterprises"* (2004).

<sup>110</sup> See:

<[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Corporations\\_and\\_Financial\\_Services/Completed\\_inquiries/2004-07/insolvency/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2004-07/insolvency/index)>.

<sup>111</sup> They were under four broad categories: the regulation of the insolvency process; the role of administrators and directors; the treatment of employee entitlements; and the need for empirical research and review processes.

<sup>112</sup> Appendix 1 refers to Submissions by David Morrison, Colin Anderson and Jenny Dickfos (Griffith University).

<sup>113</sup> Professor Keay (University of Leeds) was interviewed and cited.



Commissions on insolvency are relatively rare, academic researchers have many opportunities to contribute in response to government papers and inquiries as well as to independent statutory agency enquiries.

Second, the ways in which academics can contribute are by written (and, upon invitation, oral) submissions. In addition, even if they are not in a position to make a formal submission, academics can usefully contribute by forwarding their published research on the topic under consideration to the enquiry.<sup>114</sup>

Third, because of the way in which insolvency law intersects with so many other areas of law that regulate business or society, insolvency specialists can make a unique contribution to the public good by highlighting intersections that would otherwise go unnoticed.<sup>115</sup>

Fourth, despite submissions and appearances by numerous academics as well as other stakeholders, no outcome or even a response may be forthcoming from government. Even where recommendations are accepted by government, it may still take many years before references to a Report appear in proposed law reforms.<sup>116</sup>

Fifth, and associated with the previous comment about lack of a government response, some issues keep recurring – even where there are many submissions and recommendations supporting a change. One particular example has been highlighted – the lack of data available to assist with empirical research into corporate insolvency. Most recently, the 2014 Senate Economics Committee report on the inquiry into the “*Performance of the Australian Securities and Investments Commission*” endorsed previous recommendations that ASIC should provide and disseminate information it receives from a range of sources in order to keep the business and academic worlds better informed about developments and trends in corporate Australia.

Sixth, international dimensions are relevant to government enquiries into insolvency. Since the earliest law reform commission report to which I referred, overseas academics have made submissions and also acted as consultants and, in more recent times, been invited to participate in public hearings by teleconference.

My final theme is not necessarily drawn from the information collated for this paper. Rather it based on a story which I heard while investigating this topic – and which I have subsequently verified through Hansard. When Australia’s Personal Property Securities legislation was introduced into Parliament in 2009, Phillip Ruddock, a former Attorney-General who at that time was a member of the opposition party, was speaking in favour of the bill, which had bipartisan support:

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<sup>114</sup> For example, Jeffrey Fitzpatrick and Vivienne Brand (Flinders University) with Christopher Symes (University of Adelaide) submitted their conference paper “Fit and Proper: An Integrity Requirement for Liquidators in the Australian Corporate Legal Framework” to the Senate Economics Committee “*Inquiry into Liquidators and Administrators*” (2010).

<sup>115</sup> A good example is Jenny Buchan’s submission regarding the impact on franchisees of franchisor insolvency.

<sup>116</sup> The Working Party Report on the “*Review of the Regulation of Corporate Insolvency Practitioners*” (1997) was finally mentioned when the bill to amend corporate insolvency laws was introduced in 2007.

“What I can say is that this issue became an issue largely by accident. I was attending a regional bar association and law society conference on the Sunshine Coast at Coolumb. My wife said to me: ‘Look, there is this session on personal property security. If you can’t see anything else in the program that you want to do, you might as well go along.’ I went along and I heard a presentation from the late Professor David Allan from Bond University on measures that had been taken in some states of the United States and Canada to simplify personal property securities and, equally, the measures to codify arrangements that had been put in place by New Zealand. I heard from a very distinguished legal practitioner at that time about the very considerable business that he as a legal practitioner had in advising on variations in personal property security in different jurisdictions. The point that he was making was that if you are a legal practitioner you can spend a lot of time and you can generate very considerable costs, which clients have to pay, offering advice on differences that are in fact totally unnecessary.

I have also spent a bit of time with people in business, people who you might think would not be interested in these matters. ... It reinforced my view that this was an absolutely essential reform. We did take it to SCAG [Standing Committee of Attorneys-General for the Commonwealth, States and Territories] and we got the states to agree there. We did take it to COAG [Council of Australian Governments] and, I might say, it was not an easy path to get the department of finance and the Treasury to agree to meet some of the costs of getting the states up to the barrier in relation to this. I might also say that if you did not drive it, it was not going to happen.”<sup>117</sup>

Professor David Allan who gave the speech which the government Minister heard had spent a professional life time, commencing in New Zealand in 1964, pursuing law reform to acknowledge the value of personal property and bring it into line with the contemporary needs of society, especially in light of globalisation and the problem of “fugitive assets”. If you wish to read an account of a dedicated academic being proactive and making submissions, even when there was no enquiry in place, then I refer you to two articles written by the late Professor Allan.<sup>118</sup>

This proactive, rather than reactive, stance is to be applauded. It puts me in mind of an insight by Professor Ian Fletcher shared in last year’s Edwin Coe Lecture about:

“...the vital need for those who possess a technical understanding of the law and its actual working to establish effective channels of communication with legislators and with policy-makers in government, to ensure that there is a proper appreciation of the vital impact that this complex and much-misunderstood area of law has upon the totality of social well-being in a modern, credit-based, mercantile society. Therefore it is an important aspect of the “mission” of insolvency practitioners to improve awareness, both on the part of the wider public and within the corridors of government, of the realities of insolvency law and practice, and to do so in a way that earns public confidence and respect rather than

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<sup>117</sup> See:

<<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2009-09-16%2F0220%22>>.

<sup>118</sup> D. Allan, “Personal Property Security - A Long Long Trail A-Winding” [1999] *Bond Law Review* 12, available at: <<http://www.austlii.edu.au/au/journals/BondLawRw/1999/12.html>>; D. Allan, “Uniform Personal Property Security Legislation for Australia: Introduction to the Workshop on Personal Property Security Law Reform” [2002] *Bond Law Review* 1, available at: <<http://www.austlii.edu.au/au/journals/BondLawRw/2002/1.html>>.

functioning merely as special pleading on behalf of the vested interests of those “in the business”.”

Such a quote seems an appropriate place to conclude this brief examination of the contribution by insolvency specialists seeking to improve the design of the Australian insolvency system. Insolvency specialists can play an important, even unique, role in such policy debates – and in so doing, promote the public good.